Supreme Court of the United States.

No. 254.—October Term, 1905.

Oscar D. Halsell, Oscar G. Lee, Leonidas L. Land, Daniel P. Wright and Jean H. Everest, Appellants,
vs.
William C. Renfrow and R. J. Edwards.

Appeal from the Supreme Court of the Territory of Oklahoma.

[May 14, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action for the specific performance of an alleged agreement to convey land, brought by the plaintiffs in error against the defendants in error. The case was tried before a Judge of the Supreme Court, and all the issues were found for the defendants. It then was taken before the full Court upon a transcript of the evidence and proceedings, and the judgment for the defendants was affirmed. Okl. . Thereupon it was brought here by appeal.

It is assumed by the parties that the statement of facts prefixed to the opinion in the record is not the finding required by the Act of April 7, 1874, c.80, § 2, 18 Stat., Part 3, 27, and we assume for purposes of decision that under the Act of May 2, 1890, c. 182, § 9, 26 Stat. 81, 86, no such finding of facts was necessary. See *Oklahoma City* v. *McMaster*, 196 U. S. 529. *Rama* v. *Rama*, (April 2, 1906.) But when, as here, the court of first instance saw the witnesses, the full Court of the Territory would deal with its finding as it would with the verdict of a jury, and would not go beyond questions of the admissibility of evidence and whether there was any evidence to sustain the conclusion reached. *Ellison* v. *Beannabia*, 4 Okl. 347, 352. This Court naturally would go no further unless in an unusual case. See *Sanford* v. *Sanford*, 139 U S. 642.

In view of these preliminaries, if any statement is necessary here when the judgment sets forth that the Court "finds the issues in said cause in favor of the defendants," a single matter would be enough. It appears from the petition that after the defendant Renfrow, who was the owner of the land, had broken off his dealings with the plaintiffs, he conveyed the premises to the defendant Edwards. In Edwards's answer it is alleged that he purchased for value and without notice. The answer of Renfrow though less specific is to like effect. This was one of the issues in the cause which were found for the defendants, as upon the evidence it well might be.

Therefore it is not necessary to go further in order to show that the judgment cannot be reversed. For, of course, specific performance is impossible where the party to the contract has sold the property to one who is free from all equities. However, as the full Court put its affirmation of the judgment upon other grounds we will not stop at this point.

The full Court sustained the single judge on the ground that under the Oklahoma statute in force at the time no contract relating to real estate, other than for a lease for not over one year, "shall be valid until reduced to writing and subscribed by the parties thereto;" Laws of 1897, ch. 8, § 4, and that the statute had not been satisfied, or the case taken out of it by part performance. This statute, if taken literally and naturally, goes further than its English prototype. It is not satisfied by a memorandum made with a different intent, but requires an instrument drawn for the purpose of embodying the contract, and, in the case of an agreement to buy and sell, the subscription of both the buyer and seller, not merely that of "the party to be charged therewith." *McCormick* v. *Bonfils*, 9 Okla. 605, 618. There was no such instrument. We rather infer that the Court below inclined toward the foregoing construction, but its discussion suggests that possibly a memorandum to be gathered from connected documents might be enough, and, therefore, again, we do not stop here.

The case for the plaintiffs is this: Shields, an agent without authority in writing, as required by the Oklahoma statute, made an agreement to sell the land for ten thousand dollars, and received a check for five hundred dollars. Material additions were made to this check afterwards by the plaintiffs, so that it is a question at least whether it was admissible in evidence. Wilson's Stat. Okl. 1903, § 831. See *Bacon* v. *Hooker*, 177 Mass. 335, 337. The agent telegraphed to Renfrow that he had sold "the forty acres ten thousand cash five hundred forfeit," and Renfrow telegraphed back confirming the sale. Later it turned out that a parcel of fifty by one hundred feet had been conveyed to a third person. The parties met and it was agreed orally that two hundred dollars should be taken from the price for this. It was found further that one Springstine had or claimed possession of a part of the land under a lease. Renfrow was willing to convey and to take proceedings to turn Springstine out, but the plaintiffs refused to take a conveyance or to pay unless they were put into possession in thirty days. While matters stood thus Renfrow signed a deed of the land, excepting the conveyed parcel, expressed to be in consideration of ten thousand dollars, sent it to a bank and wrote to the plaintiff Halsell that he had done so, and had instructed the bank to deliver the deed upon his depositing $9,500 to Renfrow's credit and $500 to the credit of Shields within two days. This is the nearest approach to a memorandum that was made. Halsell replied to Renfrow that he had

made a tender of $9,300, and that this with the $200 agreed to be allowed for the strip conveyed and the $500 held by Shields would make the $10,000. He further stated that he had requested delivery of possession which had been refused, and that Renfrow could not expect the money without giving possession. Renfrow replied, stating that he had been willing to give such possession as he could, suggesting that he would have arranged in another way as to the $200, and that he regretted the termination of the matter. That was the end of the dealings, and directly afterwards the sale to Edwards took place.

As the plaintiffs were unwilling to accept the deed unless a fuller and more undisputed possession were given than could be given at the time, Renfrow was justified in selling to another who would take the risk or rely upon his covenants. In fact Edwards paid $500 to get possession, in addition to Renfrow's price of $10,000. Moreover, the plaintiffs' unwillingness shows that apart from the differences as to consideration there was no agreement with regard to an essential term of the conveyance when the deed was sent to the bank. There may have been a previous oral agreement, such as is suggested by the letter and deed, but before any memorandum was made and while Renfrow still was free the plaintiffs were informed that Renfrow would undertake to do only what he could, and what we have stated. So far, therefore, as the writings convey the notion of an absolute undertaking to convey a present clear possession, they do not express the modified bargain to which Renfrow was willing to assent. The delivery of the deed was authorized only upon payment of the price, and acceptance of it would have been an assent to Renfrow's terms. But there was no such assent. The plaintiffs say now that the differences were only trifles, not going to the essence of the contract, but they were enough at the time to make them unwilling to accept the deed.

In view of the findings of the trial Judge it is difficult to see what is open as to part performance. As there was no agreement at the last stage, there can have been no part performance then. The few steps, if any, that were taken, while everything rested in parol, before the modification as to the amount of land and the price, and the arising of the difficulty as to possession, were disputed and obliterated by Springstine under his adverse claim as a lessee. We think that this matter does not deserve discussion at greater length.

It is said that the defendant Renfrow is estopped by the payment of five hundred dollars to Shields by force of the act of 1897, ch. 8, § 7, to the effect that any person "having knowingly received and accepted the benefits, or any part thereof, or any conveyance, mortgage or contract relating to real estate shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract, or the power or

authority to make and execute the same, except on the ground of fraud." But here again we are met by the findings and the facts. The check given to Shields was not a payment to Renfrow. Shields had not even oral authority to convey or to receive the purchase money. The terms of Renfrow's letter to Halsell about the deed show that he had not accepted the delivery of the check as a payment then, and since then it would seem that neither party to the litigation has been willing to accept the money.

It appears to us unnecessary to amplify further the reasons for affirming the judgment below.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.